IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 3963 OF 2005

Raosaheb Krishna Gunware,
Age: 40 years, Occ.: Agriculture,
R/o. Agoti No.1, Tal: Indapur,
Dist. Pune. .... Applicant.

Versus.

1. Parshuram Govinda Gunaware,
   Age: 19 yrs., Occ.: Agriculture.
2. Govinda Barik Gunaware,
   Age: 55 yrs, Occ.: Agriculture.
   both residing at Agoti No.1,
   Tal: Indapur, Dist. Pune.
3. The State of Maharashtra. .... Respondents.

Shri S.S.Salunkhe for the Applicant.

Shri R.S.Kate for the Respondents Nos.1 and 2.

Ms.M.H.Mhatre, A.P.P. for Respondent No.3.

CORAM : ABHAY S. OKA, J.

DATED : 28th October, 2005.

ORAL JUDGMENT.

1. Submissions of the learned Advocates appearing for the parties were heard on the last date and today the application is kept for dictation of judgment.

2. This application is made by the original Complainant for cancellation of bail. The bail is granted by the Sessions Court in favour of the

Respondents Nos.1 and 2 who are the accused Nos.1 and 2. The learned Advocate for the Applicant submitted that the application for bail made by the Respondents Nos.1 and 2 earlier after filing of the charge sheet was already rejected by the Sessions Court. and there was no occasion for the learned Sessions Judge to entertain one more application by the Respondents Nos.1 and 2 as there was absolutely no change in the circumstances. He submitted that the learned Judge has committed a factual error by stating that the age of the Respondent No.2 is 70 years when on his own showing the age of the Respondent No.2 is 55 years. He submitted that the order granting bail is perverse being contrary to law laid down by the Apex Court. He submitted that the order is patently illegal as no reasons are assigned for granting bail. The learned Advocate appearing for the Respondents Nos.1 and 2 Shri Kate submitted that the bail cannot be cancelled as a matter of course and no case is made out for cancellation of bail. He submitted that the bail has been granted on merits.

3. I have considered the submissions. The offence alleged against the Respondents Nos.1 and 2 is under sections 302, 323, 326 504 and 34 of the Indian Penal Code. According to the case of the Complainant, on 1st

September 2004 at 3.00 p.m. his father was working in his agricultural field and the deceased Subrao was watering onion crop in his field. At that time the Respondent No.1 cut a berry tree from his land and threw it into the land of the deceased. Therefore, the father of the Applicant asked the Respondent No.1 why he threw away the tree. At that time the Respondent No.1 assaulted the father of the Applicant by a stick. The deceased Subrao went to the rescue the father of the Applicant and at that time the Respondent No.1 gave blows by stick to Subrao. At that time the Respondent No.2 also came with a stick and gave blows on the head and back of Subrao. The Applicant and his father took Subrao to the Government Hospital, Indapur from where he was removed to K.E.M.Hospital, Pune. However, Subrao succumbed to his injuries in the hospital.

4. The Respondents Nos.1 and 2 filed two bail applications before filing the charge sheet, which came to be rejected by orders dated 21st September 2004 and 18th October 2004. After filing of the charge sheet, the Respondents Nos.1 and 2 preferred another application for bail which also came to be rejected by order dated 17th November 2004. By the said order dated 17th November 2004, the co-accused were granted bail by

the learned Sessions Judge. In paragraph 5 of the order, the learned Judge observed thus:

> "Statement of Sundrabai Raghunath Gunaware, mother of Ambadas, shows that the two went for intervention. Statement of Jayshree the wife of Ambadas Gunaware also shows that the two went for intervention. Statement of Malan wife of Govind Gunaware also shows that accused Nos.3 and 4 went for intervention. Even as per FIR accused Nos.3 and 4 only prevented complainant from going to the rescue of Subarao. Therefore, only accused Nos.3 and 4 are entitled to be released on bail. **Accused Nos.1 and 2 have caused death of Subarao Gunaware by giving blows by stick on his head i.e. vital part of the body. They are not entitled to be released on bail."** (Emphasis supplied)

The order itself discloses in paragraph No.2 that the application was filed after filing of the charge sheet.

5. Thereafter on 11th February 2005 a fresh bail

application was made on behalf of the Respondents Nos.1 and 2. It is pertinent to note that in the earlier bail Application No.306 of 2004 the age of the Respondent No.2 was stated to be 55 years, and the age of the other co-accused was disclosed as 75 years. In the said application filed on 11th February 2005 it is disclosed that the earlier bail application was rejected on 17th November 2004. In paragraph 8 of the order dated 21st February 2005 by which bail was granted, the learned Judge has stted thus:

> "8. FIR discloses that incident of assaulting the deceased took place on 1.9.2004. There is no dispute that the deceased died in KEM Hospital, Pune on 5.9.2004 at 8.30 p.m. The reason behind assaulting the deceased as given in the FIR is that as the father of the complainant asked the accused no.2 why he threw berry tree bushes in his land, the accused nos.1 and 2 annoyed and assaulted the deceased, the father of the complainant and caused head injury to the deceased by assaulting him with stick when the deceased had come to settle the quarrel between the father of the complainant and the accused. In the above circumstances, there is

substance in the argument advanced by the counsel for the accused that the incident took place because of a trivial incident and the accused had no intention to cause death. Cause of death as given in the PM Report is "intracerebral and intracranial bleeding with injuries, evidence of hypertensive heart disease and detailed clinical findings required". There is no clinical finding as to whether the hypertensive heart disease is also to some extent cause of death, or otherwise. In all the above circumstances, having regard to the fact that the investigation is completed, the fact that there is substance in the argument advanced by the learned counsel for the accused, that the accused had no intention to cause death and offence under section 304(II) IPC attracts and the fact that age of the accused no.2 is 70 years and the accused are permanently residing at Agoti, having landed and house property there, it is just to release them on bail, on certain conditions. It was submitted on behalf of the State that on releasing the accused on bail, they will tamper the evidence of prosecution, but the same is not acceptable due

to the age of the accused No.2 and the fact that stringent conditions can be imposed on the accused."

6. The law on the scope of a second bail application is very clear. The latest decision of the Apex Court reported in (2005) 2 SCC 42 (Kalyan Chandra Sarkar v/s.Rajesh Ranjan alias Pappu Yadav and another) deals with the said aspect. As stated earlier, the earlier application for bail made by the Respondents Nos.1 and 2 after filing of the charge sheet was rejected by the learned Sessions Judge. The Apex Court in the decision of Kalyan Chandra Sarkar (supra) held that although the principles of res-judicata and principles analogous to res-judicata are not applicable in a criminal proceedings, still the courts are bound by the doctrine of judicial discipline having regard to the heirarchical system prevailing in our country. The Apex Court held that the findings of a higher court or a coordinate Court must receive serious consideration at the hands of the court entertaining a bail application at a later stage when the same had been rejected earlier. The Apex Court held that in such an event the Court must give due weight to the grounds which weighed with the former or higher court in rejecting the bail

application. In paragraph 19, the Apex Court held thus:

> "19. .....Ordinarily, the issues which had been canvassed earlier would not be permitted to be reagitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting."

In paragraph 20 of the said decision, the Apex Court has precisely set down the scope of the subsequent bail application where earlier bail application has been rejected. In paragraph 20 the Apex Court held thus:

> "20. The decisions given by a superior forum, undoubtedly, are binding on the subordinate fora on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. **Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the**

> **earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application."** (Emphasis supplied).

The law on the point appears to be very clear. The second bail application can be entertained if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the only limited area in which an accused who has been denied bail earlier, can move a subsequent application. From plain reading of the order passed by the learned Sessions Judge on 21st February 2005, it is obvious that there is no finding recorded that there was a change in the fact situation or in law which requires earlier view being interfered with or that the earlier findings have become obsolete. This was not a case where a mere lapse of time had brought about material change in the fact situation. In fact in the bail Application no ground was set out regarding change in fact situation or change in law. The learned Judge has not at all given due weightage to the grounds on which the earlier bail application made by the Respondents Nos.1 and 2 was

rejected. If the law laid down by the Apex Court in the decision of Kalyan Chandra Sarkar (supra) is to be applied, it is clear that the second bail application made by the Respondents Nos.1 and 2 could not have been entertained by the learned Additional Sessions Judge. It was always open for the Respondents Nos.1 and 2 to approach this Court. The order shows non-application of mind as the learned Judge has said that the age of Accused No.2 is 70 years whereas even according to the case of the Respondents, the age of accused No.2 is 55 years. Thus the order granting bail is perverse and illegal and must be set aside.

7. Hence the following order is passed:

(i) Bail granted to the Respondents Nos.1 and 2 by order dated 21st February 2005 passed by the learned 2nd Additional Sessions Judge, Baramati, in Sessions Case No.8 of 2005 is cancelled and the said Respondents are directed to surrender.

(ii) Hearing of the Sessions Case No.8 of 2005 is expedited.

(iii) On the request made by the learned Advocate for the Respondents Nos.1 and 2, time of three weeks is granted to the Respondents Nos.1 and 2 to surrender before the Investigating Officer.

Judge.